No. 83-5095

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JOHN WAYNE CONNER,

Petitioner,

v.

STATE OF GEORGIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF GEORGIA

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

I.

Whether the Supreme Court of Georgia properly determined that the imposition of the death penalty in Petitioner's case was proper because the evidence authorized the jury's finding of the O.C.G.A. § 17-10-3-(b)(7) statutory aggravating circumstance?

II.

Whether the Supreme Court of Georgia properly concluded that the prosecutor's closing argument in the instant case was not so egregious as to render Petitioner's trial fundamentally unfair?

III.

Whether the constitutionality of the Georgia death penalty statute in regard to mitigating circumstances, an issue not raised on appeal below, should be reviewed by this Court?

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PART ONE

STATEMENT OF FACTS

John Wayne Conner, Petitioner, was indicted in Telfair County, Georgia during June, 1982 for the murder and armed robbery of J. T. White and for motor vehicle theft. Following a trial by jury, Petitioner was found guilty on all counts. During the sentencing phase of Petitioner's trial, the jury recommended the sentence of death for the murder. The convictions for murder and motor vehicle theft were affirmed on direct appeal to the Georgia Supreme Court, but the conviction for armed robbery was reversed.

Georgia law requires that a decision to impose the death penalty be authorized by a finding of at least one statutory aggravating circumstance. O.C.G.A. § 17-10-30; Ga. Code Ann.

§ 27-2534.1. In Petitioner's case, two statutory aggravating circumstances were submitted to the jury for its consideration, but only one statutory aggravating circumstance was found by the jury; that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it did involve depravity of mind and aggravated battery to the victim. O.C.G.A. § 17-10-30(b)(7); Ga. Code Ann. § 27-2534.1(b)(7). In conducting its sentence review in the instant case, the Georgia Supreme Court found that the evidence supported the jury's finding of the (b)(7) statutory aggravating circumstance. This petition for writ of certiorari seeks a review of that judgment of the Supreme Court of Georgia.

As a review of the facts presented at Petitioner's trial is necessary for this Court's determination of whether or not a petition for writ of certiorari should be granted, a summary of the evidence admitted at Petitioner's trial is presented at this time.

On the evening of January 9, 1972, Petitioner, his girlfriend Beverly Bates, Joey White, and the victim, J. T. White, drove with Stacey Burnham in Mr. Burnham's truck to Eastman, Georgia. (T. 170-71, 239-40). The group drove to the home of Mr. Burnham's friend to attend a party where they consumed large quantities of alcohol and smoked marijuana. (T. 171-72, 194, 202, 240, 246). At approximately midnight, the group returned to Milan, located in Telfair County, Georgia. (T. 172, 240). Mr. Burnham testified at trial that on the ride home, Petitioner crushed the victim's hat with his arm and appeared to be tormented. (T. 241-42, 251). Mr. Burnham let Petitioner, Ms. Bates and Mr. J. T. White out of the truck near Petitioner's residence. (T. 172, 241). James T. White was more intoxicated than Petitioner and appeared to be "humble and satisfied." (T. 251). Ms. Bates described the victim as "mellow" that night and stated at trial that he did not insult or accost her. (T. 186). Mr. Burnham corroborated the

testimony by stating that the victim did not make any passes at Ms. Bates. (T. 242).

Petitioner, Ms. Bates and J. T. White entered Petitioner's residence, but the men left shortly thereafter to purchase more alcohol, taking a square liquor bottle containing some alcohol with them. (T. 172-73, 330). The men walked to the home of Pete DuPree to request a ride to purchase more liquor. (T. 280-81, 331). When Mr. DuPree refused to transport them, Petitioner and Mr. White walked away from the residence together. (T. 280-82, 331).

Evidence adduced at trial indicated that Petitioner and Mr. White began to fight. (T. 272). Petitioner proceeded to first kick Mr. White with his tennis shoes and to hit him with his fists. (T. 272). Petitioner admitted that Mr. White did not make contact when Mr. White attempted to hit Petitioner. (T. 337). Petitioner struck Mr. White with the liquor bottle, and the victim ran toward a barbed wire fence in an attempt to flee. (T. 331, 334). Petitioner grabbed the victim and continued to strike him despite the fact that Mr. White had fallen into a ditch filled with water. (T. 331). Blood spurted from the victim's nose and mouth and when Petitioner heard a gurgle eminating from the victim, Petitioner believed that blood was in Mr. White's lungs. (T. 272).

Petitioner returned home, awakened Ms. Bates and stated that they had to leave because "he had done something bad" and that "he had a fight with J. T. and thought he was dead." (T. 173). Petitioner ripped off his bloody shirt and threw it into the fireplace. (T. 173-74). Ms. Bates testified at trial that Petitioner did not have any wounds or bruises when he returned home. (T. 199, 204).

Petitioner located at Cutlass Supreme automobile with the keys still inside that was parked in front of the local school. (T. 174, 331). Petitioner and Ms. Bates fled the scene in the vehicle, but stopped because Petitioner "had to be sure . . .

that J. T. was dead." (T. 174-75). Petitioner and Ms. Bates advanced toward the creek and while Ms. Bates stood nearby, Petitioner walked toward the body. (T. 176). Ms. Bates heard something "thud in the water" and Petitioner subsequently reappeared. (T. 176, 195). Petitioner stated that "he was sure, to let's go" and they left in the stolen automobile. (T. 177, 331). The couple's destination was Eastman, Georgia, where Petitioner's brother, Jack, resided. (T. 179). En route, Ms. Bates handed Petitioner money for gasoline and Petitioner gave her a five dollar bill that had evidence of dried blood on it. (T. 180). Petitioner awakened Jack Conner at his trailer and asked for money. (T. 180-81, 284). Petitioner told his brother that he had killed someone and thrown the victim in a creek. (T. 284, 288). When Jack refused to give Petitioner any money, the couple sped away towards Gainesville, Georgia. (T. 183, 284).

The Butts County, Georgia Sheriff's Department pursued the red 1981 Cutlass for a speeding violation, but Petitioner and Ms. Bates abandoned the vehicle and evaded law enforcement officials. (T. 183-84, 253-54, 289, 314). Ms. Bates dropped her purse as she climbed the wire fence. (T. 254-55). Her tan pocketbook was recovered and subsequently given to authorities. (T. 252, 267). The couple was apprehended later that day in a barn hayloft. (T. 187, 257, 260).

GBI special agent Richard Garrison, and investigator Gerald Davis interviewed Petitioner on January 10, 1982, at the Butts County Sheriff's Office after advising Petitioner of the Miranda warnings. (T. 252-53, 267-68, 276). Petitioner signed the waiver of rights form and thereafter gave a statement. (T. 263, 169-70). Petitioner informed authorities of the location of the victim, J. T. White, (T. 164). McRae Police Chief Charles Whittington found the victim lying in a ditch along with a straw hat approximately two hundred years from the Milan Elementary School. (T. 305, 308, 351). The adjacent

barbed wire fence contained human hair and blood stains. (T. 316). Mr. White's brown pouch was located among tree roots with several pieces of paper lying on the ground on the other side of the ditch. (T. 319, 340).

Dr. Larry Howard, Director of the State Crime Lab, performed an autopsy on J. T. White on January 10, 1982. (T 207-08). Dr. Howard observed multiple areas of severe trauma to the head and face, including tennis shoe markings and soil prints. (T. 209-10, 214). Mr. White's nose was broken, blood was spattered on his hands, and there was a bruise to the outside of the left eye. (T. 212, 214). The ear cartlidge was split, the left temple was mashed, the cheek bones were fractured, and the teeth were broken away from the jaw. (T. 215, 220). The victim had been hit in the face with a blount object and his clothing was torn, leaving a characteristic ripped pattern from barbed wire. (T. 215, 218-19). The trauma to the victim's head caused brain damage and bleeding that extended into the victim's lungs. (T. 209). There was a blood clot in the brain and in the cranial cavity. (T. 214). As a result of the head trauma, Mr. White drowned in his own blood - his respiratory system was choked off with blood. (T. 209). A blood alcohol test conducted on the victim revealed .27 grams percent blood alcohol level. (T. 222). The victim would have been described as drunk. (T. 222-23). Dr. Howard further testified that the minimum amount of time from the infliction of the injury until death would have been twenty minutes or possibly longer. (T. 222).

Forensic seriologist Linda Tillman testified at trial that both the Petitioner and the victim had group O type blood. (T. 292-96). Forensic seriologist John Wegel, Jr. further testified, however, that the blood samples removed from the tree branch and broken liquor bottle found at the murder scene, as well as the recovered five dollar bill contained

electrophoretic characteristics that could belong only to the victim and not to Petitioner. (T. 298-301).

Petitioner did not testify at trial and presented no evidence in his behalf. (T. 372). In Petitioner's second statement to authorities, Petitioner alleged that the victim had stated he would like to "go to bed" with Petitioner's girlfriend Beverly Bates. (T. 331). Petitioner "got mad" as a result of this remark. Id.

The jury found Petitioner guilty of murder, motor vehicle theft and armed robbery on July 14, 1982. (T. 433). Neither the state nor the defense submitted additional evidence during the punishment phase of Petitioner's trial. (T. 446-47). Petitioner was sentenced to death for the murder of J. T. White on the basis that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it did involve depravity of mind and aggravated battery to the victim. (R. 4; T. 466-67). Further facts will be discussed as necessary for consideration by this Court in determining whether the petition for a writ of certiorari should be granted.

PART TWO

REASONS FOR NOT GRANTING THE WRIT

I. THE SUPREME COURT OF GEORGIA PROPERLY APPLIED GEORGIA STATE LAW IN DETERMINING THAT THE IMPOSITION OF THE DEATH PENALTY IN PETITIONER'S CASE WAS VALID AND PROPER AS IT WAS AUTHORIZED BY THE JURY'S FINDING OF AT LEAST ONE STATUTORY AGGRAVATING CIRCUMSTANCE.

Petitioner contends that the imposition of the death penalty in this case violates the Eighth Amendment as construed in Godfrey v. Georgia, 446 U.S. 420 (1979) and Gregg v. Georgia, 428 U.S. 153 (1976). Specifically, Petitioner asserts that the evidence fails to support the jury's finding of aggravated battery and depravity of mind. Respondent submits that the Supreme Court of Georgia was correct in its conclusion that the evidence authorized the jury's finding of the O.C.G.A. § 17-10-30(b)(7) statutory aggravating circumstance.

Petitioner asserts that a mere fight between two inebriated persons, resulting in the death of one, does not constitute an aggravated battery constitutionally sufficient to impose the death penalty. Petitioner analogizes the instant factual situation with that in Godfrey v. Georgia, supra, wherein this Court found the evidence insufficient to support the finding of the "(b)(7)" statutory aggravating circumstance. A review of the evidence in the instant case compels this Court to reach a different result from Godfrey.

O.C.G.A. § 17-10-30(b)((7); Ga. Code Ann. § 27-2534.1 (b)(7) authorizes a death sentence where:

> The offense of murder, rape, armed robbery, or kidnapping was outrageously or wantonly vile, horrible, or inhuman in

that it involved torture, depravity of mind, or an aggravated battery to the victim.

In Godfrey v. Georgia, supra, the jury found as to the (b)(7) statutory aggravating circumstance, that the murder was "outrageously or wantonly vile, horrible, or inhuman." This Court held that while the (b)(7) statutory aggravating circumstance is not unconstitutional on its face, its application in Godfrey was unconstitutional. This Court found that there was no evidence of any torture, depravity of mind, or aggravated battery to the victims in Godfrey, and concluded there was "no principled way to distinguish this case, in which the death penalty was imposed, from the many cases in which it was not." Godfrey v. Georgia, supra, at 433.

In the instant case, the jury found that the offense of murder was outrageously and wantonly vile, horrible and inhuman in that it did involve depravity of mind and aggravated battery to the victim. (R. 4). The Supreme Court of Georgia concluded that the evidence supported the finding of the statutory aggravating circumstance. As found by that Court:

> Injuries on his [the victim's] forehead bore the pattern of the sole of a tennis shoe. His nose was broken, his cheek bones were fractured, his eyes were swollen and his left ear was severely damaged. He had been hit so hard in the face with a blount object that teeth, as well as portions of the bone to which they were attached, were broken away from his upper and lower jaws.
>
> * * *
>
> Appellant chased an unarmed, intoxicated victim (who failed to leave a mark on his assailant) from the road, across a drainage

> ditch and into a barbed wire fence, dragged him back to the drainage ditch; used a whiskey bottle, a heavy stick and his two feet to beat and stomp the victim to death; and left him to die, lying in the water. The evidence shows that the defendant unnecessarily and wantonly inflicted serious physical abuse upon the victim prior to his death.

Conner v. State, 251 Ga. 113 (1983).

Respondent submits that the Supreme Court of Georgia properly concluded that the evidence authorized the finding of the (b)(7) statutory aggravating circumstance.

Aggravated battery is a crime defined by statute. O.C.G.A. 16-5-24; Ga. Code Ann. 26-1305. As noted by the Supreme Court of Georgia in Conner, "an aggravated battery occurs when "[a] person . . . maliciously causes bodily harm by another by . . . seriously disfiguring his body or a member thereof." Conner v. State, supra, quoting Hance v. State, 245 Ga. 856, 861, 268 S.E.2d 339 (1980). In order to constitute aggravated battery, the bodily harm to the victim must occur before death. Godfrey v. Georgia, supra; Hance v. State, supra. In this instance, the evidence showed that the Petitioner inflicted serious physical abuse upon the victim prior to his death. Thus, the evidence supports the jury's finding of the aggravated battery prong of the (b)(7) statutory aggravating circumstance.

As to depravity of mind, a defendant who tortures a victim or commits an aggravated battery upon the victim can be found to have a depraved mind. Hance v. State, supra at 861; Thomas v. State, 245 Ga. 688 (1980). In view of the serious physical abuse inflicted by Petitioner upon the victim in this case, the jury was authorized to conclude that the murder did involve depravity of mind.

Finally, Petitioner has complained of the jury instructions concerning the (b)(7) statutory aggravating circumstance, an issue not raised below on appeal; thus not properly before this Court. Cardinale v. Loiuisiana, 394 U.S. 437 (1969). Petitioner contends that a more detailed instruction should have been given, claiming that the jury misunderstood the statutory language and found three aggravating circumstances. A perusal of the jury's verdict as written, however, indicates that the jury fully comprehended the trial courts' instructions. The verdict as written provides: "The offense of murder was outrageously and wantonly vile, horrible, and inhumane in that it did involve depravity of mind and aggravated battery to the victim." (R. 4).

Initially, Respondent would have this Court note that there was no request for a clarifying instruction. Moreover, "all of the terms of the Code Annotated § 27-2534.1(b)(7) [O.C.G.A. § 17-10-30] are words of ordinary significance which require no explanation with the exception of "aggravated battery." Gilwreath v. State, 247 Ga. 824, 836, 279 S.E.2d 650 (1981). The trial court in this case defined aggravated battery to the jury.

Finally, Respondent submits that a limiting instruction on the (b)(7) aggravating circumstance is not required. As noted by the Court of Appeals in Stanley v. Zant, 697 F.2d 955, 971 (11th Cir. 1983), "we do not read Godfrey as holding that a limiting restriction is required. The inquiry in Godfrey focused on whether the evidence in that case satisfied the criteria previously established by the Georgia Supreme Court for application of § (b)(7). By stressing the factual setting that gave rise to the case, the Supreme Court in Godfrey was not required to resolve the issue of whether a limiting instruction of § (b)(7) is mandated by cases such as Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) that stressed the importance of channeling jury discretion in

death cases, or whether the Georgia Supreme Court's proportionaltiy review of capital cases is alone sufficient to keep Section (b)(7) within constitutional bounds."

The instruction given Petitioner's jury was stated in terms of the State's contention: that the offense was outrageously and wantonly vile, horrible and inhuman in that it involved depravity of mind and aggravated battery. The jury's finding was stated in essentially the same terms as the jury instructions. Petitioner's allegation that the jury misunderstood the charge is without foundation.

In conclusion, Respondent respectfully submits that the Supreme Court of Georgia has properly dealt with the jury's finding of the (b)(7) statutory aggravating circumstance and that there is nothing presented for the review of this Court.

II. THE SUPREME COURT OF GEORGIA PROPERLY INTERPRETED GEORGIA STATE LAW IN CONCLUDING THAT THE PROSECUTOR'S CLOSING REMARKS DID NOT REQUIRE REVERSAL OF PETITIONER'S DEATH SENTENCE.

Petitioner contends that the prosecutor's closing arguments and the admission into evidence of Petitioner's spontaneous statement resulted in a trial that was fundamentally unfair. Respondent submits that the prosecutor's remarks in the sentencing phase of trial are properly before this Court for consideration, but the allegation concerning the prosecutor's remarks in the guilt-innocence phase of trial was not raised below and hence, is not properly before this Court. See Cardinale v. Louisiana, supra. Additionally, Petitioner's complaint concerning the admission of his statement given the morning of his trial is also raised for the first time in this proceeding. Id. Respondent submits that the Supreme Court of Georgia properly concluded that the prosecutor's remarks in the

sentencing phase of trial, while improper, did not warrant the reversal of Petitioner's death sentence.

Initially, Petitioner asserts that the Supreme Court of Georgia and the Eleventh Circuit Court of Appeals are in conflict as to what constitutes "constitutionally intolerable" conduct by a prosecutor at the sentencing stage of trial. Respondent submits that there is no conflict except on the narrow issue of the interpretation of "passion" under a Georgia statute.

In Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), the Eleventh Circuit Court of Appeals vacated the Petitioner's death sentence on the basis that the prosecutor had given a constitutionally impermissible closing argument in the sentencing stage of Petitioner's bifurcated death penalty trial. The Court found that the "prosecutor's fervent appeal to the fears and emotions of an already aroused jury was error of constitutional dimension." Hance v. Zant, supra at 951. After citing the alleged impermissible portions of the argument, the court concluded, "This dramatic appeal to gut emotion has no place in the courtroom, especially in a case involving the penalty of death." Hance v. Zant, supra at 952-53.

In the instant case, the Supreme Court of Georgia reexamined, in light of Hance, its interpretation of O.C.G.A. § 17-1-35(c)(1), wherein the state appellate court must determine whether or not the sentence of death "was imposed under the influence of passion, prejudice, or any other arbitrary factor." The court recognized that similarities between the argument of the prosecutor here and in Hance were present while the arguments could also be distinguished factually. However, the court felt "compelled, in these circumstances, to decide whether Hance is correct in assuming that emotion is an altogether improper factor in a death penalty case." The Georgia Supreme Court conducted a lengthy analysis of both federal and state principles governing death

penalty cases as well as reviewing the historic reasons for imposing capital punishment. Recognizing that the Fifth Circuit had noted in Washington v. Watkins, 655 F.2d 1346, 1376 n. 57 (5th Cir. 1981), that the exercise of mercy could never be a wholly rational, calculated, and logical process, the Supreme Court of Georgia enunicated its corollary: "That the refusal to exercise mercy can never be a wholly, rational, calculated, and logcial process." Conner v. State, supra, Slip. Op. at p. 14 (Emphasis added).

The Georgia Supreme Court reasoned that the Eleventh Circuit in Hance had been doubtlessly influenced by the inclusion of the word "passion" in O.C.G.A. § 17-10-35(c)(1). However, the Court restated its conclusion that the imposition of the death penalty could never be a wholly rational, calculated or logical process. Relying upon various state law decisions as well as Spinkellink v. Wainwright, 578 F.2d 582 (5th Cir. 1978), the Georgia Supreme Court held that "the passion proscribed by our law does not encompass all emotion, but only that engendered by prejudice, particularly racial prejudice, or other arbitrary factors." Conner v. State, supra, Slip. Op. at p. 14 (footnote deleted). The Court concluded:

> We think it is clear that neither the Eighth Amendment or O.C.G.A. § 17-10-35(c)(1) forbids a death penalty based in part on an emotional response to factors in evidence which implicate valid penological justifications for the imposition of the death penalty. Per force, argument by the prosecutor which "dramatically appeals" to such legitimate emotional response is not "constitutionally intolerable." To the extent that Hance v. Zant holds to the contrary, we must disagree."

Conner v. State, supra, Slip. Op. at p. 15-16 (emphasis added).

Respondent submits that the conflict which exists between the Supreme Court of Georgia and the Eleventh Circuit focuses on the narrow issue of whether a prosecutor may appeal to legitimate emotion in his argument. The Eleventh Circuit had concluded that any appeal to emotion, by the prosecutor as opposed to counsel for the defendant, was impermissible. However, after reexamining the Georgia statute, the Supreme Court of Georgia concluded that an appeal to "legitimate" emotion is tolerable. Respondent submits that the crux of the matter is the manner in which the prosecutor urges the imposition of the death penalty. Recognizing that the prosecutor in Hance blatantly exceeded the bounds of permissible argument, Respondent asserts that not each appeal to emotion is constitutionally intolerable.

The Supreme Court of Georgia reviewed the closing remarks of the prosecutor in the sentencing phase of Petitioner's trial and concluded that while improper, the remarks did not involve such "egregious misconduct" on the part of the prosecutor to require reversal of Petitioner's death sentence on the basis that it was impermissibly influenced by passion, prejudice or any other arbitrary factor. Conner v. State, supra, Slip. Op. at p. 17-18. Respondent submits that the decision of the Supreme Court of Georgia is proper.

The standard of review of a prosecutor's comments at trial is "the narrow one of due process, and not the broad exercise of supervisory power that [federal appellate courts] possess in regard to [their] own trial courts." Darden v. Wainwright, 699 F.2d 1031, 1034 (11th Cir. 1983), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 642 (1973). Unless a specific guarantee of the Bill of Rights is involved, it must be shown that the remarks were so prejudicial that they rendered the trial in question fundamentally unfair. Houston v. Estelle, 569 F.2d 372, n. 8 (5th Cir. 1978); Cobb v. Wainwright, 609

F.2d 754, 755-56 (5th Cir. 1980). The prosecutor's comments must not be considered in isolation, but must be evaluated in the context not only of the prosecutor's entire closing argument but of the trial as a whole. Cobb v. Wainwright, supra; Branch v. Estelle, 631 F2d 1229 (5th Cir. 1980). As noted by this Court, "the process of constitutional line drawing in this regard is necessarily imprecise." Donnelly v. DeChristoforo, supra at 645.

The Supreme Court of Georgia found as improper the portion of the prosecutor's argument wherein he informed the jury that he had been involved in criminal law for seven years and that as district attorney for the circuit, had prosecuted nine murder cases, but never before sought the death penalty. The Supreme Court found that that portion of the argument was not supported by any evidence and was not relevant to any issue in the case; therefore, the argument was improper. Conner v. State, supra, Slip. Op. at p. 16-18. The Court noted that no objection had been made to the remarks, but reviewed the remarks because this was a death penalty case. Id. The Court concluded that the remarks were not so prejudicial or offensive and did not involve such "egregious misconduct" to require reversal of Petitioner's death sentence. Id. Respondent submits that the decision of the Supreme Court of Georgia is correct.

A review of the record in the instant case reveals that defense counsel, in his opening remarks to the jury, alluded to the death penalty. (T. 165). The State presented overwhelming evidence of Petitioner's guilt. Because Petitioner presented no evidence in the guilt/innocence phase of his trial, defense counsel had the right to the initial closing argument as well as rebuttal. Defense counsel waived the initial closing argument and gave his closing argument in the guilt-innocence phase after the prosecutor's argument. (T. 373). No evidence was presented in the sentencing phase of trial by either the

state or Petitioner (against the advice of Petitioner's counsel). The prosecutor then gave closing argument. (T. 448-50). Defense counsel again had the "last word." (T. 450-53). Respondent submits that the prosecutor's remarks did not render Petitoner's trial fundamentally unfair.

Petitioner has also objected to the remarks of the prosecutor referring to another murder for which Petitioner was not on trial. This issue was not raised below and therefore, is not properly presented to this Court. See Cardinale v. Louisiana, supra. Were this Court to consider this issue, however, Respondent asserts that no error has been shown. On the morning of Petitioner's trial, a Jackson-Denno hearing was held to determine the admissibility of Petitioner's statement to police before the trial began. (T. 137-43). The trial court concluded that Miranda warnings were not required as the statement was spontaneous and was given voluntarily. (T. 145). Therefore, the statement was admissible. The prosecutor argued that Petitioner's statement indicated Petitioner's depravity of mind. Petitioner has failed to establish that the admission of this evidence rendered his trial fundamentally unfair. Therefore, Respondent respectfully submits that this issue presents nothing for review by this Court.

III. THE TREATMENT OF MITIGATING CIRCUMSTANCES UNDER GEORGIA'S DEATH PENALTY STATUTE, NOT QUESTIONED ON APPEAL BELOW, IS CONSTITUTIONAL.

Petitioner has raised an allegation, for the first time, that the Georgia death penalty statute is unconstitutional because it does not direct the sentencer to "weigh" aggravating and mitigating circumstances against each other or otherwise instruct the sentencers' use of mitigating circumstances. Respondent submits that the issue of the constitutionality of the death penalty statute can not be raised for the first time

on petition for certiorari. It is a well established principle of law that this Court will not decide federal constitutional issues raised for the first time on review of state court decisions. Cardinale v. Louisiana, 394 U.S. 437, 438 (1969). In addition, Respondent submits that the allegation is clearly without merit upon an examination of relevant case law. Finally, Respondent submits that this Court has found the Georgia death penalty statute to be constitutional. Gregg v. Georgia, supra; Zant v. Stephens, No. 81-89(U.S. June 22, 1983). Respondent respectfully submits that this issue presents nothing for review by this Court.

CONCLUSION

This Court should refuse to grant a writ of certiorari to the Supreme Court of Georgia, as it is manifest that no substantial federal question not previously decided by this Court is presented and the decision sought to be reviewed is demonstrably in accord with the applicable decisions of this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, William B. Hill, Jr., Attorney of Record for the Respondent and a member of the Bar of the Supreme Court of the United States, hereby certify that in accordance with the rules of the Supreme Court of the United States, I have this day served a true and correct copy of this Brief in Opposition for the Respondent, by depositing a copy of the same in the United States mail, with sufficient postage affixed thereon, and addressed to:

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This 12th day of September, 1983.

WILLIAM B. HILL, JR.